

# Rule-Making in Interscholastic Sports: The Bases of Judicial Review

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## *Introduction*

Athletic associations and school boards have historically enjoyed a position of virtual legal immunity in their efforts to regulate participation in athletics at the high school level. While the grounds for judicial review of any decision by school authorities were quite limited, athletics seemed to present a particularly compelling case for non-intervention by the courts. Denying a student the opportunity to participate in interscholastic sports did not directly affect the student's standing in the predominant and most important function of the school — its educational venture. Athletics were seen as truly "extra-"curricular and thus not entitled to serious legal scrutiny.

The picture changed considerably in the 1970's. Decisions of school boards and athletic associations were challenged on several fronts. Some of these disputes went to the core of the authority of those in charge of athletic programs — the right to demand conforming personal behavior from those who participated in sports activities. The epitome of this shift was in judicial actions invalidating rules requiring athletes to be clean shaven and to wear their hair at a modest length.<sup>1</sup> Many of those on school boards and in athletic associations, who will be referred to here by the general term "athletic administrators," surely saw an ominous sign in these cases. If athletic administrators could not control the physical appearance of those students who were "public representatives" of their schools and whose participation in sports was wholly voluntary, then surely there was some

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<sup>1</sup> See, *Dostert v. Berthold Public School Dist. #54*, 391 F. Supp. 876 (D.N.D. 1975); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970). See generally *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); *Stevenson v. Board of Educ.*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

question as to whether any significant restriction on participation could be imposed.

The rules on personal grooming were not the only matters to undergo significant reform in the 1970's. One interested in studying how the law responds to changing social attitudes would be attracted to the cases involving rules which limited the right of married students to participate in interscholastic athletics. Throughout the 1960's, the overwhelming weight of authority upheld the power of athletic administrators to disqualify married students from school-sponsored athletics.<sup>2</sup> The school authorities developed a list of reasons as to why this result was appropriate, and this eventually became the litany that courts recited in their summary affirmance of the administrators' actions.<sup>3</sup> Married students, it was said, had new responsibilities and should therefore limit their more frivolous extracurricular involvement. Worse yet, married students had "experiences" supposedly not familiar to those unmarried, and it was feared that the newly-wedded might be inclined to talk about these. Such exchanges could be demoralizing to others on the team.<sup>4</sup> And if, heaven forbid, the unmarried students were *not* demoralized, then at least it could be said that they had been corrupted.<sup>5</sup>

Despite, or more likely because of, their quaintness, these marriage rules did not endure the social reforms of the '70's. Case after case came down, first in 1972, then in 1973, 1974 and 1975. In a consistent and rather rapid line of decisions, the learning of the prior 70 years was discarded.<sup>6</sup> And the reform appears to have been complete. Neither commentators nor the courts have indicated doubts about

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<sup>2</sup> See, e.g., *Board of Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854 (Iowa 1967); *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960); *State ex rel. Baker v. Stevenson*, 189 N.E.2d 181 (Ohio C.P. 1962); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 302 S.W.2d 57 (1957); *Kissick v. Garland Independent School Dist.*, 330 S.W.2d 708 (Tex. Civ. App. 1959); *Starkey v. Board of Educ.*, 14 Utah 2d 227, 381 P.2d 718 (1963).

<sup>3</sup> See, e.g., *Board of Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854, 858 (Iowa 1967). See also *Cochrane v. Board of Educ.*, 360 Mich. 390, 103 N.W.2d 569 (1960); J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 86-87 (1979).

<sup>4</sup> See *Board of Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854, 858-59 (Iowa 1967).

<sup>5</sup> *Id.* at 859: "6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities."

<sup>6</sup> *Hollon v. Mathis Independent School Dist.*, 491 F.2d 92 (5th Cir. 1974); *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973); *Romans v. Crenshaw*, 354 F. Supp. 868 (S.D. Tex. 1972); *Moran v. School Dist. #7*, 350 F. Supp. 1180 (D. Mont. 1972); *Holt v. Shelton*, 341 F. Supp. 823 (M.D. Tenn. 1972); *Davis v. Meek*, 344 F. Supp. 298 (N.D. Ohio 1972); *Indiana High School Athletic Ass'n v. Raikes*, 329 N.E.2d 66 (Ind. App. 1975).

the legal soundness of the results achieved.<sup>7</sup>

The extent to which the cases of the '70's represent an intrusion upon the autonomy of the regulators of school sports should not be underestimated. The administering authorities lost more court cases between 1970 and 1979 than they had in the prior several decades.<sup>8</sup> It is understandable that many administrators emerged from that period quite uncertain about their ability to impose any significant, non-grade related restraints on the right to participate. There may have been confusion as to why the judicial attitude had changed. Of equal uncertainty were the implications of the judicial reversals for other areas of the administrators' authority. Were the issues of grooming and marriage wholly distinct, or did these cases mean that no action based in personal preference could be infringed upon by official regulation? Relatedly, if something as traditional as good grooming could not be compelled, were there any conventional values that could be required in the administrators' regulatory scheme?

One task that lies ahead for the 1980's seems clear: there is a need to examine the precedent of the past several years and to clarify its meaning for the authority of those who administer school sports. We will undertake this examination in the context of a particular type of regulation. A good deal of recent litigation has been focused on the so-called transfer rules, which, to varying degrees, limit a student's right to participate in athletics after he or she has transferred from one school to another. The frequently stated purpose of these rules is to discourage movements between schools which are athletically motivated, as where the student or a coach at the transferee school seeks to gain a competitive advantage by virtue of the move.

The present inquiry into these rules is prompted by a number of concerns. It can be noted for example, that while transfer rules have historically been accorded the great judicial deference shown to other school-sports regulations, a smattering of recent cases has yielded decisions in which particular forms of the rules have been either struck down or seriously disputed.<sup>9</sup> Thus, the transfer rule cases seem to be

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<sup>7</sup> See H. APPENZELLER & T. APPENZELLER, *SPORTS AND THE COURTS* 67-71 (1980); Perle & Browning, *Student Classifications and Equal Protection: Marriage and Sex*, 3 J.L. & EDUC. 93 (1974); *Right of Married High School Students to Engage in Extracurricular Activities*, 22 BUFFALO L. REV. 634 (1972). See also Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

<sup>8</sup> This conclusion can be sustained by researching the West Key Numbers *Schools and School Districts* 164 to 172 through several Decennial Digests.

<sup>9</sup> See *Kite v. Marshall*, 494 F. Supp. 227 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006); *Sturup v. Mahan*,

subject to some of the same forces that prompted reforms in other areas in the 1970's. In addition, however, the transfer rule cases are notable because the regulations in question touch on matters that go to the basic philosophy of regulating school sports. The ostensible basis of rules discouraging transfers is a desire by athletic administrators to discourage an overemphasis on athletics and to maintain the academic side of the school's affairs as the main object of the students' undertaking. These, however, are matters about which students, parents, and coaches may well have different preferences. The question arises then as to how far athletic administrators can go in controlling the philosophical orientation of their athletic programs.

While this discussion focuses on transfer rules, the underlying policy questions are the same as those found in a variety of other regulatory problems. For example, an issue which has a particular affinity to the present inquiry concerns the propriety of a decision to "hold back" a junior high school athlete for a year so that he or she can enter high school competition with increased physical and emotional maturity. As in the case of a transfer decision, such action may be criticized for its singular emphasis on athletics. By the same token, however, students and parents may assert that the matter is one in which their choices should have primacy.<sup>10</sup> Transfer rules were selected as the subject of the present discussion because of the larger body of administrative material and case law which they have generated. The presence of common philosophical themes, however, should suggest the more general application of principles developed here.

### *Transfer Rules: Background*

It is not difficult to see why the rules governing student transfer of schools have been controversial. For one thing, there appears to be no general agreement on how stringently the rules ought to be drawn. Ostensibly the rules are designed to discourage ill-advised transfers by students and to control improper recruiting by coaches seeking to build strong athletic teams. A student typically loses a year of eligibility if his or her transfer is deemed to be within the prohibition of the applicable rule. Variations occur, however, in the definition of what is a proper transfer. Some authorities permit transfers, without a loss of eligibility, if there is a bona fide change in the parents' resi-

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305 N.E.2d 877 (Ind. 1974); *Sullivan v. University Interscholastic League*, 599 S.W.2d 860 (Tex. Civ. App. 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981).

<sup>10</sup> See generally Phillips, *Fattening Them Up for Football*, Time, March 9, 1981, at p. 41; Norton, *'Holdbacks' Slow Down to Get Ahead*, State (Columbia, S.C.), Oct. 25, 1981, at p. 1, col. 2.

dence.<sup>11</sup> Other regulators have rejected this exception and have tried to require the student to sit out for a year even where the transfer was from another state several thousand miles away and was prompted by a change in the student's parents' employment.<sup>12</sup> In still other situations, the rules have been structured to authorize appropriate officials to make an individualized inquiry in certain types of cases.<sup>13</sup> The purpose of the inquiry is to determine whether the athlete has been subjected to improper recruiting pressures. If no such improper influences are found, the transfer is permitted. If generalized to all cases, this approach theoretically would achieve the most just results, for the regulation could be carefully tailored to fit the perceived abuse. Those students who were influenced by improper recruiting would incur a period of ineligibility, while those who moved for independent reasons would be unaffected. By comparison, rules imposing an across-the-board loss of eligibility, or even one that allowed "bona fide" parental moves, are more crude measures and are likely to disadvantage some students whose moves involve none of the evils which prompted the regulations in the first place.<sup>14</sup> But

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<sup>11</sup> See *Hebert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981); *Denis J. O'Connell High School v. Virginia High School League*, 581 F.2d 81 (4th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980); *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 975 (N.D. Ill. 1978); *Dallam v. Cumberland Valley School Dist.*, 591 F. Supp. 358 (M.D. Pa. 1975); *Scott v. Kilpatrick*, 286 Ala. 129, 237 So.2d 652 (1970); *Sturup v. Mahan*, 305 N.E.2d 877 (Ind. 1974); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969); *Josephine County School Dist. #7 v. Oregon High School Activities Ass'n*, 15 Ore. App. 158, 515 P.2d 431 (1973); *Bruce v. South Carolina High School League*, 189 S.E.2d 817 (S.C. 1972).

<sup>12</sup> See *Sullivan v. University Interscholastic League*, 599 S.W.2d 860 (Tex. Civ. App. 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981).

<sup>13</sup> The Tennessee Secondary School Athletic Association has used a rule as follows:

'Except for the eligibility rules in regard to age and to the number of semesters in school, the Board of Control shall have authority to set aside the effect of any eligibility rule upon an individual student when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student.'

'Requests for the consideration of such exceptions shall be acted upon by the Board of Control only twice during each school year — at the fall meeting held the latter part of August and at the January meeting.'

'The conditions causing the student to fail to meet the eligibility requirements must have been beyond the control of the school, the student and or his parents, and such that none of them could have reasonably been expected to comply with the rule the violation of which is involved.'

*Tennessee Secondary School Athletic Ass'n v. Cox*, 221 Tenn. 164, 425 S.W.2d 597, 598 (1968). See also *Sturup v. Mahan*, 305 N.E.2d 877, 878-79 (Ind. 1974).

<sup>14</sup> See, e.g., *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980) (court finds that athlete was not motivated by athletics and new school did not have good teams, but no relief); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969); *Bruce v. South*

even the wisdom of an individualized approach is subject to debate. One athletic association provided a system of case-by-case review for several years and then abandoned the arrangement.<sup>15</sup> The association found that the decision-makers (the principals at the transferor and transferee schools) were subjected to considerable pressure from parents and other interested parties. In this situation and in others the concern for the costs and burdens of permitting exceptions has prompted administrators to adopt rules with little flexibility.

The controversy surrounding the transfer rules is further fueled by a lack of sensitivity in the application of the regulations in some situations. Under the historical practice of nearly complete judicial deference to the decision-making of athletic administrators, the courts have found themselves compelled to endorse these rigid pronouncements. A search for dubious interpretations of otherwise reasonable rules yields several candidates. In one case, the student's parents were divorced and living in different school districts.<sup>16</sup> There was later a formal change of parental custody from the mother to the father and a related transfer of the student's residence. The applicable rule provided for a loss of a year's eligibility unless there was a "change in the residence of the parents."<sup>17</sup> When called upon to apply the rule, the appropriate official refused to approve the transfer because, while the student's family situs was altered and while the move was apparently otherwise legitimate, neither parent's residence had changed. This result was decreed even though the student's situation seemed well within the spirit of the exception approving bona fide moves. In a realistic sense, there had been a change in the residence of the student's legal parent. What the administrator, and eventually the court, failed to appreciate is that every formal regulation will require interpretation. Among the techniques of interpretation that are available, unbending literalism is frequently the least preferred.<sup>18</sup>

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Carolina High School League, 189 S.E.2d 817 (S.C. 1972); *Sullivan v. University Interscholastic League*, 599 S.W.2d 860 (Tex. Civ. App. 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981).

<sup>15</sup> *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449, 455 (W.D. Mo. 1980).

<sup>16</sup> *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977).

<sup>17</sup> *Id.* at 686.

<sup>18</sup> In other areas, ranging from contracts law to the judicial interpretation of legislative acts, it is appreciated that legal documents will require interpretation. Some imprecision occurs because of limitations in the drafting skills of the authors. More frequently, though, the need for interpretation is the predictable product of the fact that the authors at the time of drafting cannot anticipate every factual variation that may occur.

Another enduring feature of the present regime of transfer rules is that they have acquired the seemingly contradictory characteristics of being simultaneously over-inclusive and incomplete in their coverage. The rules are overbroad in that they frequently sweep within their ineligibility period persons whose transfer decisions clearly were not athletically-motivated. In one recent case, *Barnhorst v. Missouri State High School Athletic Association*,<sup>19</sup> a female student transferred from one private school to another nearer her home. The court made a specific finding that the transfer was based on the superiority of the academic program in the recipient school and that athletics did not "play any part" in the student's decision. The court also found that the recipient school was not a strong athletic power in the locale and indeed "often has difficulty in fielding a complete team in certain sports."<sup>20</sup> However, the relevant rule only approved transfers following a bona fide change of residence or a change in parental control or the closing of the student's former school. Since the student's parents had not moved, and because the other grounds were not applicable, the transfer was not permitted. The fact that the case seemed not to be within the evils underlying the regulation did not change the legal result.

The transfer rule may not, however, insure against an excessive emphasis on athletics by parents and students. Indeed, in some states, what the rule does, in effect, is to raise the cost to the parents of pursuing an athletic advantage for their children. Under some rules, parents can move their child to a school offering better competition or better coaching if they are willing to pay the price, namely the cost of disposing of one residence and acquiring another.<sup>21</sup> Thus, the truly obsessed may be given a way out.

A sociologist might be interested in how the *de facto* availability of this exception is distributed among different social classes. Those living in apartments and those with financial flexibility would seem to be preferred. These distributions can be affected by a variety of other

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Where the need arises to apply a stated rule to an unusual case, courts will frequently seek to ascertain the purpose or "spirit" of the rule and interpret it in a way that achieves a result consistent with this assumption about the drafters' intent. A search for the authors' intent will frequently provide a more accurate guide for interpretation than will a literal application of the language used. See, e.g., 3 A. CORBIN, CORBIN ON CONTRACTS §§ 532-572 (1960).

<sup>19</sup> 504 F. Supp. 449 (W.D. Mo. 1980).

<sup>20</sup> *Id.* at 455.

<sup>21</sup> See, e.g., *Sturup v. Mahan*, 305 N.E.2d 877, 878-79 (Ind. 1974). See also note 10 *supra* and accompanying text. Some states which otherwise allow a transfer where there is a change in the parents' residence will apparently impose a period of ineligibility in some cases where a further inquiry reveals that the move was athletically-related. See *Marino v. Waters*, 220 So. 2d 802, 803-04 (La. App. 1969).

factors as well. For example, rumors continue to circulate about employers who arrange for intercompany transfers of employees whose children enjoy superior athletic skills. An employer subsidy of the cost of making a transfer between cities operates to remove perhaps the most significant barrier to such a move.

Under one view, then, the transfer rules represent a haltering form of regulation. At the same time that the rules fail to except the compelling cases of some persons whose transfers were not athletically motivated, they also leave unregulated transfers for which improved athletic opportunities were the sole motivation. This unevenness provides a further explanation for why the transfer rules continue to attract attention.

### *Criticisms of the Present Regulatory Regime*

The prior analysis dealt with some of the structural features of the transfer rules. There are other questions, in particular issues of policy, that should be considered. One of the enduring legacies of the cases involving grooming and marriage rules is that the administrators of amateur athletics do not have complete discretion to define the preferences which will be reflected in their regulations. Indeed, the blunt point of those 1970's decisions is that room must be left for some self-direction by those students who participate in athletics. Not only are there non-traditional, non-majoritarian views that must be tolerated,<sup>22</sup> but in addition certain aspects of student and parental decisions on athletic participation appear to be protected by a veil of privacy that precludes official examination.

There is only the most preliminary consideration of these concerns in the transfer cases decided to date,<sup>23</sup> and the reader will want to note that the following paragraphs are not a reflection of present case law. For the present, we seek only to identify those concerns which might be taken into account in structuring regulations concerning interschool transfers. The policy issues raised here are of the sort which are likely to be considered by a deliberative body — school board or athletic association — that undertook to rethink its previ-

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<sup>22</sup> "Our institutions do not rely on submerging individual personality in order to create an idealized citizen." *Bishop v. Colaw*, 450 F.2d 1069, 1078 (8th Cir. 1971). See also *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970).

<sup>23</sup> See, e.g., *Kite v. Marshall*, 454 F. Supp. 1347 (S.D. Tex. 1978), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006). Cf. *Laurenzo v. Mississippi High School Activities Ass'n*, 662 F.2d 1117 (5th Cir. 1981) (action dismissed as moot); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981) (court does not reach privacy argument).



ous policy on transfers and summer camps. Whether these policy concerns represent valid legal objections is a much different matter. A later portion of the paper notes the extent to which the grounds for judicial review are drawn in more narrow terms. For now, we simply explore a variety of non-legal complaints that might be raised against the rules.

As already suggested, the transfer rules reflect a judgment that it is inappropriate for a high school student, either by choice or through enticement by a coach, to pursue athletics as a primary or even a prominent goal in the student's school activities.<sup>24</sup> Devotion to athletics, it is thought, will limit the student's involvement in other important activities, especially the educational venture of his school. The judgment is made that the benefits of athletic participation are likely to be considerably less enduring than those that flow from academic endeavors. The probabilities against a high school athlete making a living from athletics are overwhelming. Moreover, participation in the traditional team sports does not ensure long-term physical fitness.<sup>25</sup> By contrast, the student's academic undertaking is thought to carry a significantly greater likelihood of a lifetime return. After all, it will be said, the high school curriculum offers an important preparation not only for the student's later vocational efforts but also for his or her family and personal endeavors.

One who was critical of the restraints on transfers might offer two responses to this analysis. As an initial matter, it is not altogether obvious that a student's substantial involvement in athletics is inappropriate. Perhaps more importantly, a question can be raised as to who should have the ultimate right to determine the relative emphasis given to athletics by a particular student. While athletic administrators have traditionally reserved that decision to themselves, there are others — the student and his or her parents — who might also claim a right to make that determination.

While we will consider these responses as they apply to transfer rules, it seems appropriate to note again that the present inquiry bears on other issues which come before athletic administrators. As mentioned, the controversial practice of holding back junior high ath-

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<sup>24</sup> See, e.g., *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969). A related policy concern is raised in cases involving limitations on the student's right to participate in specialized summer sports camps. See *Kite v. Marshall*, 494 F. Supp. 227, 239 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006); *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970); *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 738 (Mo. Ct. App. 1973).

<sup>25</sup> See, J. MICHENER, *SPORTS IN AMERICA* 89-92 (1976).

letes to enhance their chances in high school competition is often condemned on the grounds that it allows athletic concerns to overshadow the more durable educational aspects of the student's experience. Because the student's suitability for post-high school competition is far from assured, the selection of an athletically dominated career is seen as speculative beyond the bonds of reason.<sup>26</sup> And, as with transfer decisions, the positive values associated with established schoolmate relationships are subverted. By the same token, the hold back issue generates some of the same objections raised against the regulation of interschool transfers. There are those who regard the financial rewards of athletic success to be sufficient to fully establish the appropriateness of decisions which maximize a student's athletic development. The sports endeavor can be seen as an initial exploration of a potential vocation or as a mechanism for financing the participant's college education.<sup>27</sup> Moreover, regulation by athletic administrators may be seen as an unjustified intrusion into an area where personal and family preferences should predominate. The decision to hold back is likely to be prompted by a mixture of motives. Parents concerned about the social maturity of their children may desire to allow for an additional year's development. Or the parent may be influenced by a perceived lack of educational preparedness on the part of the student. Or the hold back decision may be related to a concern for the student's athletically related physical development. Whether these factors appear in combination or singularly, parents will argue, they all involve decisions that have traditionally been regarded as beyond state control.<sup>28</sup> Again, these are concerns which serve to link the regulation of student transfers with other aspects of the administration of interscholastic sports.

We now turn to more detailed examination of the controversies underlying transfer regulations. The issue of the appropriateness of an emphasis on athletics is not a matter that lacks for controversy. Some commentators have argued that many young people are misled by a singular devotion to sports.<sup>29</sup> This is especially a concern for

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<sup>26</sup> One athletic administrator has observed that "having a kid repeat a year just feeds the pipe dream." Phillips, *Fattening Them Up for Football*, Time, March 9, 1981, at p. 41.

<sup>27</sup> *Id.*

<sup>28</sup> The parent of a student involved in a hold back controversy in South Carolina perceived that "the real issue is the right of the parent to decide what's best for his child . . ." State (Columbia, S.C.), Oct. 25, 1981, at p. 6, col. 4.

<sup>29</sup> Underwood, *The Writing Is on the Wall. The Shame of American Education: The Student Athlete Hoax*, Sports Illustrated, May 19, 1980, at 36-44; Thomas, *Guidance Is Imperative to Save Student-Athletes*, Chicago Tribune, June 8, 1980, § 4, at 3, col. 4.

inner-city youths, perhaps because the lure of professional athletics stands in such sharp contrast to the limited opportunities available under their more traditional vocational options. It is difficult to conclude that this viewpoint is wholly erroneous. There is, however, another perspective that is likely to gain its own advocates.

It can be observed, for example, that there are some students for whom a consistent development of their athletic talent holds significant social and economic rewards.<sup>30</sup> The clearest cases are those athletes who do in fact attain a position on a professional team. There are presently several million-dollar-a-year professional athletes.<sup>31</sup> And for virtually all of these, their earnings from sports are greater, by several hundred percent, than the wages attainable in their most likely alternative form of employment. Indeed, assuming constant dollars, there are many athletes who will earn more in a single year than many of us can expect to earn in a lifetime.

Those sympathetic to the observation made above would also point out that for many professional athletes the traditional route of four years of high school followed immediately by four years of college is difficult to justify. We find examples of this in several different sports. Tennis players, for example, may exhibit professional quality play while still in high school. Baseball players may develop professional affiliations either without attending college or before their college careers are completed. And recently we have seen basketball players who have moved from high school to professional ranks without the intermediate step of four years of college.<sup>32</sup> For many, it can-

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<sup>30</sup> See Luschen, *Social Stratification and Social Mobility Among Young Sportsmen*, in *SPORT, CULTURE AND SOCIETY* 258 (Loy & Kenyon, eds. (1969)); Otto & Alwin, *Athletics, Aspirations and Achievements*, 42 *SOCIOL. EDUC.* 102 (1977); Picou, *Race, Athletic Achievement, and Educational Aspiration*, 19 *SOCIOL. Q.* 429 (1978); Rehberg, *Behavioral and Attitudinal Consequences of High School Interscholastic Sports: A Speculative Consideration*, 4 *ADOLESCENCE* 69 (1969); Rehberg & Schafer, *Participation in Interscholastic Athletics and College Expectations*, 63 *AM. J. SOCIOL.* 732 (1968); Schafer & Rehberg, *Athletic Participation, College Aspirations and College Encouragement*, 13 *PA. SOCIOL. REV.* 732 (1968); Spreitzer & Pugh, *Interscholastic Athletics and Educational Expectations*, 46 *SOCIOL. EDUC.* 171 (1973).

<sup>31</sup> In baseball these include Dave Winfield (Yankees), Fred Lynn (Angels), Phil Niekro (Braves), Andre Dawson (Expos), Nolan Ryan (Astros), Eddie Murray (Orioles), Dave Parker (Pirates), and Al Hrabosky (Braves). Pope, *Baseball Pays Better Than Politics*, *Chicago Tribune*, Mar. 8, 1981, § 4, at 6, col. 1. Among basketball players with \$1 million contracts are Kareem Abdul-Jabbar, Earvin (Magic) Johnson, Moses Malone, and Otis Birdsong. In 1981, Magic Johnson signed a contract which will pay him \$1,000,000 per year for the next 26 years. Eskenazi, *Athletes' Salaries: How High Will the Bidding Go?*, *New York Times*, Aug. 16, 1981, § 5, at 1, col. 1.

Even for players other than these exceptional stars, professional sports can be very lucrative. The average salary in baseball is now in the neighborhood of \$180,000. In basketball, the average salary is \$193,000 per year, while the football average is \$78,657. *Id.*

<sup>32</sup> Moses Malone is perhaps the most successful of the basketball players who began their

not be seriously contended that their careers have been enhanced by four more years of school-related competition. With respect to other athletes who moved directly to professional teams, arguments are sometimes made that they would have benefited from several years in college. It will be noted, though, that the benefits hypothesized are those related to athletic training and not those that flow from involvement in the college's educational venture.

The athletes affected by the above analysis are the truly exceptional and they are very few in number. They are not, however, the only ones for whom the conscientious development of their athletic skills makes good social and economic sense. Many parents appreciate that athletic prowess can provide the basis for financing a college education. The availability of athletic scholarships is by no means limited to athletes with near certain professional potential. Indeed, the number of athletes securing positions with professional teams is only a very small portion of the students leaving college after attending on a scholarship.<sup>33</sup> Those players who do not proceed further have still gained a substantial advantage by receiving a financial subsidy for their education.

The amounts involved can be quite substantial. The precise value of the scholarship will vary from school to school. But for an athlete from a middle class family, attending a good private university, a four-year college financial aid package will frequently represent the equivalent of roughly \$67,000 in parental earnings. That is, taking account of the effects of taxation, the parents would have to use \$67,000 in personal earning to buy the equivalent of the four-year financial aid package.<sup>34</sup> Understandably, a parent might be pleased to have the \$67,000 available for other purposes, while still ensuring that the child receives a college education.

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professional careers immediately after high school. *New York Times*, May 20, 1979, § 5, at 1, col. 4. He was selected the most valuable player in the NBA in 1979. *Id.*, May 23, 1979, § II, at 6, col. 5. For the 1980-81 season, his salary was reputed to be \$1,050,000; for 1981-82, it will be \$50,000 more. Eskenazi, *Athletes' Salaries: How High Will the Bidding Go?*, *id.*, Aug. 16, 1981, § 5, at 1, col. 1.

<sup>33</sup> One source has reported that chances of a college basketball player securing a permanent position on an NBA roster are on the order of 1 in 18,000. See Klein, *Basketball Stars Get Jump on College Life at a Summer Camp*, *Wall Street Journal*, Aug. 6, 1981, at 1, col. 4.

<sup>34</sup> This calculation is based on the assumption that the financial aid package of tuition, room, meals and books is worth \$10,000 per year. Four years of such aid would total \$40,000. If the student's parents were in a 40% tax bracket, they would have to earn roughly \$67,000 to yield \$40,000 after taxes.

This calculation does not discount future years' costs to present value. By the same token, however, no upward adjustment is made for anticipated increases in the value of the package. It may be that these two adjustments would largely offset one another.

Other parents would not make a \$67,000 expenditure. Indeed, some could not afford to support the child's education at all. In these cases, the child's athletic involvement is not an obvious evil. It may in fact provide the opportunity for an education that is not otherwise available.

There will be a debate as to whether transfer rules have any significant impact in deterring an athlete from realizing the benefits outlined above. Many athletes have secured significant returns from athletics even in the present system in which restraints on transfers are commonplace. But this uncertainty has a double-edge to it. If the rules have had a significant impact, it will be argued, then the concerns expressed above warrant attention. On the other hand, if the transfer rules have had no substantial effect, opponents will argue, they should be eliminated. While these two positions can be debated, the expenditures made for litigation contesting the rules weighs in favor of the validity of the former proposition.

There is a further criticism that some might urge. It is possible to agree with the notion that athletics should not be allowed to dominate a student's perspective and at the same time doubt the propriety of rules seeking to prevent an overemphasis on the sports. The alternative view is that it is the athlete and his parents, and not the local school board or state athletic association, who should decide the balance to be struck between the student's athletic and educational ventures. A respectable view can be put forth that ultimate responsibility for the nurturing and development of the child should lie within the family unit. The state has traditionally not been allowed to claim an exclusionary role in those endeavors, and while there may have been periods in which state intrusions went unquestioned, it will be argued, we have recently developed clearer notions of the proper role of personal and family autonomy.<sup>35</sup> These have served to identify zones of privacy into which state intrusion is precluded. While numerous examples could be offered, the courts' refusal to enforce grooming and marriage rules in the school sports context will be seen by some as a sufficient illustration. Proponents of this view may raise a rhetorical point: is it not true that decisions concerning career orientation have the same highly personalized qualities that have led to the protection of individual decisions on hair length and marriage?

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<sup>35</sup> The Supreme Court has unmistakably marked out certain zones of family privacy into which state regulation can intrude only if there are compelling reasons. Limitations on the state's right to control abortion and choices with respect to contraception provide the clearest evidence of this trend. For a more general discussion of the scope of this right to individual and family privacy, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 921-54, 985-90 (1978).

To the extent that an affinity exists between these decisions, there is support for objections to universalized, state imposed policies concerning the appropriateness of an emphasis on athletics.

It can be noted that there are other areas in which parents have enjoyed expansive, if not complete, discretion to influence their children's development. Indeed, on most other decisions affecting the child's career development, our legal and social institutions seem to assume that these are matters to be resolved within the family. A parent may, for example, make decisions that have the effect of steering the child toward a particular vocational path. The student's enrollment in courses in auto repair or his acceptance of an after school job in a service station may eventually culminate in permanent employment in that field. The student's endeavors could be the result of conscious parental approval, or of parental deferral to the student's own inclination. Or the particular career direction could be the product of inattention by the parent. Those who dissent from the present system of athletic regulation can observe, however, that none of the above scenarios suggests facts which would support prohibitions imposed by the state.

In specific cases, including those involving athletics, the choice of a particular career direction may be unwise. Jobs may be scarce, or the student may ultimately lack necessary skills. Opponents of pervasive state control will observe, though, that these have not traditionally been accepted as a reason to abandon the restraint on state intrusions into the realm of family and individual privacy.

To this point, the discussion has assumed that the predominance of athletics in a particular student's life represents a career direction. That is not always the case and it must be accepted that there are innumerable variations in the motives that might influence a parent's or student's decision to seek a transfer to another school. Even here, proponents of milder controls may find grist for their arguments. For example, some parents see athletic participation as the incentive that maintains the child's interest in his or her academic subjects. Studies have shown that students who are not otherwise "interested in" school would resist continued attendance if it were not for the opportunity to participate in athletics.<sup>36</sup> For other children, success in sports may provide the self-esteem that allows them to endure less satisfying experiences in their academic subjects.<sup>37</sup> In cases such as

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<sup>36</sup> COLEMAN, *ADOLESCENTS AND THE SCHOOLS* 45 (1965); Landers & Landers, *Socialization Via Interscholastic Athletics: Its Effects on Delinquency*, 51 *SOCIOL. EDUC.* 299 (1979); Schafer & Armer, *Athletes Are Not Inferior Students*, 6 *TRANSACTIONS* 21 (1968).

<sup>37</sup> See Hanks, *Race, Sexual Status and Athletics in the Process of Educational Achieve-*

these, it will be argued, decisions to enhance the athletic experience, or to avoid an unpleasant one, are important. For that reason, it will again be urged that ultimate responsibility for the difficult choices to be made in this area ought to lie within the family unit.

A further criticism of the state's role in these matters is that the pursuit of the articulated lofty goals has not always been consistent. For example, as previously mentioned, the rules imposed frequently include exceptions that can be utilized by parents with an inclination, and sufficient resources, to shift their child to a more competitive school. Critics would observe that in addition the impact of state policies varies considerably among sports. While athletic administrators may seek to deny team sport players the opportunity to refine their skills in specialized summer camps, athletes in other sports, especially tennis, frequently are allowed to continue to pursue individualized instruction and even organized summer tournaments.<sup>38</sup> The parents of the basketball or football player might be able to secure some type of individualized counseling from a skilled instructor. But this is not the equivalent of what the tennis player receives, even if it is otherwise permitted. Without the opportunity to participate in a team venture, the training received would be of limited value. When the state does not pursue its regulatory policies with an even hand, the basic credibility of the policy is undermined and, opponents would urge, the state's insistence upon its right of control develops a hollow ring.

A final difficulty with the present transfer rules is that there is frequently uncertainty as to whose conduct they are intended to regulate. The discussion to this point has focused on the impact which the rules have upon decisions made by students and parents. Critics will observe, however, that abuses are not always the product of choices made within the family. Many situations giving rise to concern involve efforts by a coach to induce talented athletes to transfer to the local school. Improprieties perpetrated by such persons would seem to raise policy issues different from those generated by a family decision.

A school system may properly decide that it does not want to operate an intense, highly competitive athletic program. And, of course,

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ment, 60 Soc. Sci. Q. 482 (1979).

<sup>38</sup> See, e.g., *Dumez v. Louisiana High School Athletic Ass'n*, 334 So. 2d 494 (La. App. 1976) (prohibition of transfer rule not applicable to golf, tennis, and swimming). See also *Kite v. Marshall*, 494 F. Supp. 227, 229 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006); *Caso v. New York State Public High School Athletic Ass'n*, 434 N.Y.S.2d 60, 62-63 (S. Ct. 1980).

the school may seek to convince other members of its athletic association to adopt the same view. However, some will observe that the above principles do not necessarily authorize the school system to regulate the highly personalized choices that students or parents might make in connection with a school move. Coaches and other school personnel do not have the same privacy rights as parents. Coaches, for example, are employees of their schools and are obligated to execute whatever goals have been defined for the school system that employs them.

Proponents of reform might note that it would be possible to have a regime of regulation that sought to both prohibit recruiting by coaches and respect parental decisions concerning the emphasis that a child should place on athletics. Restraints would be placed on activities of coaches and others, and these persons could be subjected to periodic reporting and observation requirements. Parents, on the other hand, would be left free to choose among available athletic alternatives, subject always, of course, to academically-based restraints on school transfers.<sup>39</sup> The array of athletic alternatives available might not offer all that particular parents might want, but no direct effort would be made to regulate directly private decisions that were made.

To the extent that present regulations are really intended to control recruiting, they have taken an approach which critics are likely to find sweeps too broadly. While it is true that recruiting will be deterred, it is also true that the rules will affect cases far removed from the concern for improper inducements. As already noted, the prohibition will be extended to situations in which the absence of recruiting is established by specific inquiry<sup>40</sup> or reasonably inferred because of the nature of an accompanying parental move.<sup>41</sup> Detractors of the present approaches would urge that more precision in the mechanism for regulation could insure that the burdens of the controls were borne by those whose actions are most properly the object of concern.

The preceding analysis is intended to suggest that there is indeed "another" view of the problem of overemphasis on athletics. The regulations imposed in this area have reflected little sympathy for this contrary view. The question arises as to whether the future will see a

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<sup>39</sup> Considerable freedom of choice by parents is allowed under some present forms of regulation. See note 13 *supra* and accompanying text.

<sup>40</sup> See *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980).

<sup>41</sup> See *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981).



change in direction, particularly a change more sympathetic to the position outlined above. While a reconsideration of present policies could come at the level of decision-making by school boards and athletic associations, our more immediate concern is with the judicial treatment of the rules in question. A specific issue is whether these opposing viewpoints can be translated into legal doctrine that will prompt intervention by the courts. We now turn our attention to that issue. The analysis begins with a review of the courts' traditional approach to transfer and summer camp rules. The outcome of that review has already been indicated: in the vast majority of cases, the courts have refused to intervene in controversies concerning the rules in question. Such a posture means, of course, that the rules have been upheld. A few more recent cases have been to the contrary. These are likely to offer encouragement to those who endorse the views discussed above. A consideration of these recent decisions follows the review of existing precedents.

### *Traditional Standards for Judicial Review*

An interesting feature of the cases considering transfer rules is that they involve at least three different legal theories. Not all of these are considered in each case and often there is no ready explanation as to why the case was litigated on less than all of the doctrinal bases that might have been offered. In most cases, however, the choice of a different theory would not have changed the ultimate result of the case. As traditionally applied, none of the three approaches placed significant restraints on the rule-making powers of athletic administrators. The relevant doctrine involved application of the law of private associations, principles of state public law, and elements of federal constitutional law.

#### *1. The Law of Private Associations*

Our law has historically been highly deferential to internal decision-making by private associations. The general rule has been variously expressed. Some authorities assert that the courts will not intervene to overturn a private association rule unless it violates a criminal statute or is otherwise contrary to natural justice.<sup>42</sup> Other courts reach essentially the same result by suggesting that they will not overturn private association rules in the absence of fraud, mis-

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<sup>42</sup> See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 37 (1979); Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1014 (1930); Comment, *State High School Athletic Associations: When Will a Court Interfere?*, 30 MO. L. REV. 400, 402-06, (1971).

take, or basic corruption in the organization.<sup>43</sup> The origins of this standard of review are in early English cases involving social clubs and fraternal organizations. Where a group of individuals had joined together and endorsed specific standards of conduct and eligibility, it was thought inappropriate for an outside agency, such as the courts, to impose its own perception of appropriate behavior.<sup>44</sup> This approach was early accepted by courts in this country,<sup>45</sup> and the instances of judicial intervention into the affairs of private non-commercial associations are few in number.

These principles found application in the area of athletic regulation because of the nature of the governing entity. The rules in question were usually adopted and enforced by a state athletic association. The association typically consisted of a group of schools, often including both public and private schools, that voluntarily joined together to promote a common interest in interscholastic sports. Because a school's participation was not mandatory, many courts were led to the conclusion that the group's regulations should be judged according to the standards applied to other private collective bodies. This premise inevitably led to the conclusion that the association's rules would be upheld.<sup>46</sup> Fraud, corruption, and breaches of natural justice were never serious questions in the litigated cases. Hence, the courts perceived that they had before them purely private affairs which gave no reason for judicial scrutiny.

## 2. State Public Law

Some courts treated the cases before them as not involving the de-

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<sup>43</sup> *Sult v. Gilbert*, 148 Fla. 31, 3 So. 2d 729 (1941); *Robinson v. Illinois High School Ass'n*, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963); *State ex rel. Indiana High School Athletic Ass'n v. Lawrence Cir. Ct.*, 240 Ind. 114, 162 N.E.2d 250 (1959); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969); *State ex rel. Ohio High School Athletic Ass'n v. Judges of Ct. Common Pleas*, 173 Ohio St. 239, 181 N.E.2d 261 (1962); *Morrison v. Roberts*, 183 Okla. 359, 82 P.2d 1023 (1938); *Tennessee Secondary School Athletic Ass'n v. Cox* 221 Tenn. 164, 425 S.W.2d 597 (1968). See generally 6 AM. JUR. 2D § 27 *Associations and Clubs* (1963).

<sup>44</sup> See Chafee, *The Internal Affairs of Associations Not for Profit*, note 42 *supra*. *Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 990 (1963).

<sup>45</sup> See, e.g., *Shaup v. Grand Int'l Bhd. of Locomotive Eng'rs*, 223 Ala. 202, 135 So. 327 (1931); *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968); *Brotherhood of R.R. Trainmen v. Price*, 108 S.W.2d 239 (Tex. Civ. App. 1937); *Samuelson v. Railroad Trainmen Lodge 852*, 60 Wyo. 316, 151 P.2d (1944).

<sup>46</sup> See, e.g., *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969); *State ex rel. National Jr. College Athletic Ass'n v. Luten*, 492 S.W.2d 404 (Mo. App. 1973); *Mozingo v. Oklahoma Secondary School Activities Ass'n*, 575 P.2d 1379 (Okla. App. 1978); *Bruce v. South Carolina High School League*, 189 S.E.2d 817 (S.C. 1972).

cision of a private entity, but rather a determination by a state instrumentality. This approach was thought to be particularly appropriate where the action under review was one taken by a school board. Such a board was clearly a public body and thus not within theory applicable to purely private entities.<sup>47</sup> Because of the governmental nature of the action, a somewhat more exacting level of review was thought to be appropriate.

The present standard is not limited to school boards, however. Athletic associations have also been subjected to it.<sup>48</sup> The reason for this similarity in treatment presents an important conceptual point concerning the relationship between such entities and the schools that are members. Generalizations are somewhat difficult because of the various organizational structures that are followed. But in most states, a school's participation in the state association is not mandated by legislative rule. Where this is true, the courts may properly view the association as *de jure* or *de facto* delegates of the local school districts.<sup>49</sup> A public school's participation in an athletic association is thus not a purely private affair. If the matter were handled formally, such participation would be with the approval and subject to the ultimate control of the school board. But even in the absence of action amounting to a formal delegation, the school's participation involves tacit public action. Consequently, whatever authority the association exercises would have its source in the association's status as an agent of the state entity.<sup>50</sup> Thus, actions of the association should be subject to the same level of review as would be applied to decisions by the public entity itself.

In terms of its substance, the present standard of review is not an invitation for courts to undertake a close and exacting scrutiny of the rules that have been adopted by the school board or athletic associa-

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<sup>47</sup> See, e.g., *Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217 (E.D. Mich. 1970); *Kinzer v. Directors of Independent School Dist.*, 129 Iowa 441, 105 N.W. 686 (1906); *Fitzpatrick v. Board of Educ.*, 284 N.Y.S.2d 590 (S. Ct. 1967).

<sup>48</sup> See, e.g., *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970); *State ex rel. Ohio High School Athletic Ass'n v. Judges of Ct. of Common Pleas*, 173 Ohio 239, 181 N.E.2d 261 (1962); *Morrison v. Roberts*, 183 Okla. 359, 82 P.2d 1023 (1938); *Tennessee Secondary School Athletic Ass'n v. Cox*, 221 Tenn. 164, 524 N.W.2d 597 (1968).

<sup>49</sup> See, e.g., *Kriss v. Brown*, 390 N.E.2d 193 (Ind. App. 1979); *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970); *Morrison v. Roberts*, 183 Okla. 359, 82 P.2d 1023 (1938); *Anderson v. South Dakota High School Activities Ass'n*, 47 N.W.2d 481 (S.D. 1976). See also *Spain v. Louisiana High School Athletic Ass'n*, 398 So. 2d 1386 (La. 1981).

<sup>50</sup> See, e.g., *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Anderson v. South Dakota High School Athletic Ass'n*, 247 N.W. 2d 481 (S.D. 1976). See also *Spain v. Louisiana High School Athletic Ass'n*, 398 So. 2d 1386 (La. 1981).

tions. The view is frequently expressed that these entities have been charged with managing a particular sphere of activity and decisions made in pursuit of that end are entitled to deference.<sup>51</sup> But it is also agreed that review is not foreclosed. Most courts hold, for example, that a rule should be overturned if it is beyond the range of authority that has been granted to the body in question.<sup>52</sup> Thus a school board probably could not attempt to regulate the types of summer jobs that student-athletes obtained.<sup>53</sup> Beyond those relatively easy cases, one finds various statements of the level of scrutiny that will be applied. On the surface, these might suggest that there is disagreement about the precise nature of the state law review. In upholding a series of restrictions on participation in summer camps, the Minnesota Supreme Court stated that it was not authorized to inquire into "the propriety, justice, wisdom, necessity, utility, [or] expediency of rules and policies adopted by a school board. . . ."<sup>54</sup> A standard which precludes inquiry into the propriety and justice of a rule would appear at first blush to impose almost no restraint on the rule-making authority of the school board. By contrast, the Iowa Supreme Court in voiding a high school association good conduct rule, operated under a standard that included a "general requirement that a rule promulgated by a governmental subdivision or unit be reasonable . . ."<sup>55</sup> An inquiry into reasonableness would seemingly permit the court to examine the propriety and justice, and indeed the necessity and expediency of the rule, matters which the Minnesota court seemed to exclude. A third court, the Missouri Court of Appeals, applied a standard which would allow it to void rules which were unreasonable in the sense of being arbitrary and capricious.<sup>56</sup> To transgress this standard, "the rule would have to be without a rational ground or justification."<sup>57</sup>

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<sup>51</sup> See, e.g., *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970); *State ex rel. Ohio High School Athletic Ass'n v. Judges of Ct. of Common Pleas*, 173 Ohio 239, 181 N.E.2d 261 (1962); *Starkey v. Board of Educ.*, 14 Utah 2d 227, 381 P.2d 718 (1963).

<sup>52</sup> See, e.g., *Board of Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854 (Iowa 1967); *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970); *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735 (Mo. App. 1973).

<sup>53</sup> See, e.g., *Kite v. Marshall*, 494 F. Supp. 227, 233 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006); *Board of Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854, 858 (Iowa 1967). See also R. PHAY, *LAW OF SUSPENSION AND EXPULSION: AN EXAMINATION OF THE SUBSTANTIVE ISSUES IN CONTROLLING STUDENT CONDUCT* 50-61 (1975).

<sup>54</sup> *Brown v. Wells*, 288 Minn. 468, 473-74, 181 N.W.2d 708, 711 (1970).

<sup>55</sup> *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555, 564 (Iowa 1972).

<sup>56</sup> *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740 (Mo. App. 1973).

<sup>57</sup> *Id.* at 741.

While these cases do not yield an indisputable statement of the appropriate standard of review, it is possible to find some coherency among them. The courts' ultimate concern again is whether the entity in question had authority to act. If the administrative entity acted in an area that had no substantial connection to the matters within its authority, then its decision should not be respected. But a critical point to be made is that there are other ways in which the school or association can exceed its authority. If it regulates activities of athletes which have no significant effect on athletics, then its action would, in one sense, be beyond its proper jurisdictional claim. Relatedly if the entity purported to make findings that a particular rule affected an athletically-related objective when all evidence was to the contrary, the resulting rule would be arbitrary. Finally, there is an impermissible arbitrariness in cases in which the athletic administrator attributed undesirable characteristics to an athlete on the basis of conduct which itself was wholly innocent. This deficiency would exist, for example, where students are disciplined for merely associating with those who had engaged in improper conduct.<sup>58</sup> The inappropriateness of the regulation in this setting is that it makes an irrational attribution of misconduct to persons who may be totally innocent.<sup>59</sup> And again there is the characteristic that the regulation ventures beyond the legitimate scope of the regulators' authority; it sweeps within its reach some conduct which bears no appreciable relationship to the goals of the organization.

The present state public law review is not an authorization to courts to sit in judgment of the normal, discretionary rulings made by a regulatory body. If the entity has conscientiously accumulated pertinent data and made deliberate choices based on the information before it, its conclusion will not be disturbed.<sup>60</sup> However, intervention is appropriate where the regulating entity imposes controls without an adequate basis for concluding that such regulation is necessary for the achievement of legitimate athletically-related goals.

In the transfer rule cases decided to date, the authorization for a limited review of state entity actions has not produced significant judicial intrusions into the regulatory efforts of athletic administrators. Where this theory has been used, the courts have typically found the rules in question to be within the bounds of discretion properly

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<sup>58</sup> See, e.g., *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972). *State ex rel Ging v. Board of Educ.*, 7 N.W.2d 544 (1942).

<sup>59</sup> Compare *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. 1981).

<sup>60</sup> See, e.g., *Hebert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981); *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 875 (N.D. Ill. 1978); *Kriss v. Brown*, 390 N.E.2d 193 (Ind. App. 1979).

claimable by the administrators.<sup>61</sup> While various methods of analysis have been used, the courts frequently undertake a two-step inquiry. The first step is to identify the evidence establishing that a problem of overemphasis exists. This may take the form of a record of a prior formal deliberation by the regulatory body<sup>62</sup> or the accumulation of evidence in the trial court.<sup>63</sup> The courts then determine whether the rule as applied to the particular complainant is responsive to the problem that has been identified.<sup>64</sup> The relevant inquiry does not include consideration of whether the particular regulation is the most effective way to deal with the problem or even whether the degree of regulation is proper in light of the problem that exists. These matters, again, are typically treated as being within the range of discretion that the public regulatory body can claim for itself.

There are few cases in which a school board or association rule of any sort has been overturned. One of these exceptions, however, is the 1972 decision in *Bunger v. Iowa High School Athletic Association*.<sup>65</sup> While *Bunger* dealt with a rule relating to alcoholic beverages, and did not directly involve an interschool transfer, the case nonetheless represents an important precedent. The court takes considerable care to present a clear statement of the limits of the regulatory authority of athletic administrators.

The rule in question addressed the situation in which an athlete would lose his or her eligibility because of involvement with alcohol related activities. In addition to consumption and possession, an offense occurred if one were merely present in a vehicle in which alcohol or dangerous drugs were transported. *Bunger* was punished under the rule after he was found to be one of four minors occupying a car that contained a case of beer. *Bunger* apparently had not consumed

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<sup>61</sup> See, e.g., *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980); *Scott v. Kilpatrick*, 286 Ala. 192, 237 So. 2d 652 (1970); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977); *Marino v. Waters*, 220 So. 2d 802 (La. App. 1969); *Mozingo v. Oklahoma Secondary Schools Activities Ass'n*, 575 P.2d 1379 (Okla. App. 1978); *Bruce v. South Carolina High School League*, 189 S.E.2d 817 (S.C. 1972).

<sup>62</sup> See *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 875, 877 (N.D. Ill. 1978); *Brown v. Wells*, 288 Minn. 468, 473-74, 181 N.W.2d 708, 711 (1970).

<sup>63</sup> See *Kriss v. Brown*, 390 N.E.2d 193 (Ind. App. 1979); *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 741 (Mo. App. 1973).

<sup>64</sup> See *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449, 463 (W.D. Mo. 1981); *Brown v. Wells*, 288 Minn. 468, 473-74, 181 N.W.2d 708, 711 (1970); *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 741 (Mo. App. 1973); *Morrison v. Roberts*, 183 Okla. 359, 361, 82 P.2d 1023, 1024 (1938); *Bruce v. South Carolina High School League*, 189 S.E.2d 817 (S.C. 1972).

<sup>65</sup> 197 N.W.2d 555 (Iowa 1972).

the beer and was not otherwise responsible for its presence. Moreover the incident occurred in the summertime.

The Iowa Supreme Court focused its inquiry on whether the rule in question was within the authority of the athletic association and whether it was a rational exercise of that power.<sup>66</sup> Several factors led the court to conclude that the conduct in question was not so substantially related to the goals of the association to justify regulation. The court noted that the incident in question was "outside of the football season, [and] beyond the school year, [and there was] no illegal or even improper use of beer."<sup>67</sup> In light of these considerations, the nexus between the school and the incident "is simply too tenuous."<sup>68</sup>

The *Bunger* court did not purport to present a new theory of state law review. The precedents cited and the standards articulated were those traditionally invoked. The actual application of these principles, however, was more exacting than those undertaken in earlier cases. *Bunger* might then be seen as representing an incremental shift toward a level of review that requires athletic administrators to establish more clearly the factual basis of their regulations. Such an approach would have interesting implications for rules affecting interschool transfers. Among the objections raised against such rules is the complaint that they frequently draw their prohibition too broadly. The evaluation of this and other implications of *Bunger* is undertaken after the following discussion of the third theory of review.

### 3. *Constitutional Analysis*

The above two theories for the review of athletic regulations have their genesis in state law. The third theory to be considered has a much different orientation. It suggests that school board and athletic association regulations may require application of principles of federal constitutional law. While the present theory is a bit newer than the others, the results in the litigated cases, especially those of the 1970's, were not substantially different.

Two basic constitutional theories were thought to have potential relevance in the present context. The first involves the plaintiff's claim to a right of substantive due process. A regulation can be

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<sup>66</sup> The court stated that one question before it was whether the particular rule was reasonable. As we have already noted, the court apparently meant this to be an inquiry into the basic rationality of the measure. See text at notes 54-58 *supra*.

<sup>67</sup> 197 S.W.2d at 564.

<sup>68</sup> *Id.*

struck down if it is proven to be incompatible with the substance, or essence, of the federal constitution. Certain rights are thought to be so fundamental that they may be subjected to regulation only by measures which promote a compelling state interest and which are carefully drawn to limit the extent of infringement. The Supreme Court has identified certain types of interests which will trigger these principles of close judicial scrutiny. Among the protected interests are the right to interstate travel<sup>69</sup> and the right to privacy in matters of marriage, childbearing, and child-rearing.<sup>70</sup> Other interests have been specifically deemed by the Court as insufficient to support claims to substantive due process. These include interests in welfare, housing, and education.<sup>71</sup>

A different theory of constitutional review emanates from the equal protection clause. While substantive due process involves a frontal attack on disputed legislation, the equal protection theory focuses on the rationality of classifications that are created by a regulatory scheme.<sup>72</sup> The purpose of the constitutional mandate is to assure that persons similarly situated are not subjected to differentiations which are arbitrary, a determination that is made in light of the type of interests involved and the difficulties confronted by the regulating entity. As the latter qualification implies, the degree of judicial scrutiny varies depending on the nature of the problem that is addressed.

Some legislative classifications will be subjected to strict scrutiny under the equal protection clause. This is true where the legislative classification imposes a burden upon persons who are members of a class that historically has been subjected to hostile discrimination.<sup>73</sup> Thus, classifications based on race or alienage are suspect. However, classifications which reflect sex- or wealth-based differences do not invoke this highest standard of review. Where a suspect class, such as race, is involved, the legislation will be upheld only if it is necessary to protect a compelling state interest. Rarely is such an interest found to be present, and few regulations affecting suspect classes are sustained.<sup>74</sup>

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<sup>69</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>70</sup> *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979); *Walen v. Roe*, 429 U.S. 589 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>71</sup> *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972). *See generally* J. NOWACK, *HANDBOOK ON CONSTITUTIONAL LAW* 416-19 (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-990 (1978).

<sup>72</sup> *See generally* J. NOWACK, *HANDBOOK ON CONSTITUTIONAL LAW* 517-35 (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-1002 (1978).

<sup>73</sup> *See, e.g., United States v. Carolina Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>74</sup> *But see Korematsu v. United States*, 323 U.S. 214 (1944).



Other types of classifications give rise to a different level of judicial scrutiny. The Supreme Court has identified certain types of interests which are not suspect classifications but which nonetheless warrant a review more exacting than that which is applied under the Constitution's most permissive standard. This intermediate level of review is triggered by a variety of classifications.<sup>75</sup> It applies, for example, where a legislative scheme makes differentiations based on gender or illegitimacy, or where the scheme invades a fundamental interest. For present purposes, the interests deemed fundamental are those protected under substantive due process notions.<sup>76</sup> Under the intermediate level of review a regulation will be upheld only if it is important to a substantial state interest. Thus, it is normally assumed that the characteristics identified above will not be subjected to regulation. Where they are, the state must be able to establish that the classification arrangement involved something more than mere preference and that a significant countervailing state purpose is being served.

Apart from cases in which there is a suspect class and those involving intermediate level interests, the Court has indicated that other legislative pronouncements are entitled to great deference. The basic test is one requiring only a loose rational relationship: if the measure in question furthers a legitimate purpose of the legislating body and if the rule chosen furthers that purpose, then it will be upheld. The Supreme Court has emphasized that the legislative classifications that are chosen need not be precise and need not be the most reasonable that might be selected. Indeed, in recent decisions, the Court has expressed this standard in the form of a question. Once it is determined that the regulation furthers a legitimate purpose, the pertinent issue becomes: "Was it reasonable for the law-makers to believe that use of the challenged classification would promote that purpose?"<sup>77</sup> Thus as long as the regulatory decision-makers may have thought that a state objective would be furthered, the regulation will

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<sup>75</sup> Some authorities prefer the view that there are not distinctive levels of review, but rather a sliding scale of intensity of analysis. The more substantial the interest involved, the more exacting the scrutiny to be applied. See *Massachusetts Bd. of Retirement v. Murgin*, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); J. NOWACK, *HANDBOOK ON CONSTITUTIONAL LAW* 79-80, *Pocket Part* at 75 (1979); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>76</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1002 (1978).

<sup>77</sup> *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-65 (1981).

Rules measured against this standard are virtually certain to survive. In the last 50 years only one case involving a wholly economic regulation was invalidated by the Supreme Court under this test. See *Morey v. Doud*, 354 U.S. 457 (1957). *Morey* was then later overruled. See *New Orleans v. Dukes*, 427 U.S. 297 (1976).

be upheld. The fact that there is a substantial body of opinion suggesting that the regulation will not be effective, or even that it will be countereffective, is not enough.<sup>78</sup> Nor is it important that the legislature was wrong in the judgment that it made. Again, all that is necessary is that the regulators *could have* reasonably believed that their legitimate goal would be achieved.

The potential applicability of these principles to transfer rules was raised with fullest vigor in the 1970's. The resulting decisions yielded several clarifying principles. One issue was whether transfer rules affected any fundamental interest so as to invoke the protection of substantive due process or require something more than a permissive level of equal protection review. Whether a fundamental interest is involved may, of course, turn upon facts peculiar to the particular plaintiff. Such would be the case where the plaintiff transferred for a religiously-based reason.<sup>79</sup> There are, however, asserted fundamental interests that are more generalized and the courts' treatment of these can be summarized. It has been held rather consistently, for example, that participation in extracurricular activities does not involve a fundamental right.<sup>80</sup> This conclusion seems correct since the right to an education is not itself fundamental.<sup>81</sup> The courts in other cases found that no suspect class was affected by the regulation of transferees.<sup>82</sup>

Among the fundamental rights potentially involved, the right to interstate travel is one that might be asserted. One lower court found an infringement of such a right when a transfer restriction was applied to a student who moved from out of state into the regulators' jurisdiction. This holding was reversed on appeal, however. The reviewing court correctly observed that there was no classification scheme which singled out those persons moving interstate. The applicable rule applied equally to all who changed schools, without regard to whether they were originally residents of the state imposing the regulation.<sup>83</sup>

In sum, the decisions of the '70's yielded no cases in which a funda-

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<sup>78</sup> See *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 667-9, 671-3 (1981).

<sup>79</sup> But see *Chabert v. Louisiana High School Athletic Ass'n*, 323 So. 2d 774 (La. 1975).

<sup>80</sup> *Hebert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981); *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 875 (N.D. Ill. 1978).

<sup>81</sup> See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35-39 (1973). See also *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980).

<sup>82</sup> See *Kentucky High School Athletic Ass'n v. Hopkins County Bd. Educ.*, 522 S.W.2d 685 (Ky. App. 1977); *Chabert v. Louisiana High School Athletic Ass'n*, 323 So. 2d 774, 779 (La. 1975).

<sup>83</sup> *Sturup v. Mahan*, 305 N.E.2d 877, 880 (Ind. 1974).

mental interest or suspect class was found to be presented. Hence, the rules in question were reviewed under the least intrusive permissive standard. The task before the courts was merely to determine whether the rule in question bore a reasonable relation to a legitimate state interest.

In pursuing this inquiry the courts considered several issues which were mentioned in our earlier examination of the policy-based criticism that might be raised against the rules in question. Our prior discussion noted, for example, that transfer rules are often applied to students who had changed schools but who had not been subjected to recruiting pressures or other undue influences.<sup>84</sup> Translated into a constitutional argument, the contention would be that the regulatory classification scheme was overinclusive — it included persons who were not participants in the evils that prompted the regulation. In the general jurisprudence of equal protection, such complaints of overinclusiveness are usually not entertained,<sup>85</sup> and the courts considering the transfer rule cases showed a similar disinclination.<sup>86</sup> The response to such objections is found in language of the Supreme Court decisions that indicates that legislative classifications need not be drawn with precision.<sup>87</sup> The fact that some inequality might result from the choice of general classifications is not grounds for invalidating a regulation.<sup>88</sup>

Relatedly, we earlier noted the objection that transfer rules are often applied without an individualized inquiry into whether the athlete in question had been recruited or not. The courts, again, have been unreceptive to this objection. The basis of their response was the admonition of the Supreme Court that the permissive standard of review permits regulators to take into account the burdens and costs involved in administering a particular rule. It is appropriate for regulators to conclude that "the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of [legislative] concern . . ."<sup>89</sup> In a similar vein, a rule will not be found

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<sup>84</sup> See text at notes 19-20 *supra*.

<sup>85</sup> See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 999 (1978). See also J. NOWACK, *HANDBOOK ON CONSTITUTIONAL LAW* 521-22 (1978).

<sup>86</sup> See, e.g., *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980); cf. *Kentucky High School Athletic Ass'n v. Hopkins County Bd. Educ.*, 522 S.W.2d 685 (Ky. App. 1977).

<sup>87</sup> See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

<sup>88</sup> See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). See also *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975).

<sup>89</sup> *Weinberger v. Salfi*, 422 U.S. 749, 784 (1975).

deficient because the regulators failed to provide for a general hardship exception or to take account of the peculiar equities of the particular case.<sup>90</sup>

A third objection raised earlier was that present transfer rules often do not control all instances of student preoccupation with sports. For example, while summer training in team sports is often controlled, it is frequently true that participants in individualized sports, such as tennis, are able to improve their skills either by individualized instruction or through pre-arranged competition with better players. While this specific objection has not been considered in the cases, the general point that underlies it has received attention from the Supreme Court. In an oft-quoted passage, the Court has indicated that a "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."<sup>91</sup> Similarly, it has been held that the present permissive standard of review does not force a legislature to choose between maximum, pervasive legislation or none at all.<sup>92</sup> Again, the regulator may properly make judgments about the aspect of a problem which warrants first attention.

The unmistakable implication of the above decisions is that regulators will be given great leeway in devising regulations that do not affect suspect classes or invade important personal liberties. Most courts have found rules dealing with the interschool transfers to be well within these bounds. An exception, however, is the 1974 decision by the Indiana Supreme Court in *Sturup v. Mahan*.<sup>93</sup> The plaintiff changed his residence to his brother's home in Bloomington, Indiana to avoid a detrimental and unstable situation in their parents' home in Florida. The brother was appointed legal guardian. When the plaintiff sought to participate in varsity sports at his Bloomington school, he was declared ineligible for a one-year period. The pertinent association rule required such ineligibility except where there was a bona fide parental move or an "unavoidable change of residence," as where the parents had died.

The Indiana Supreme Court invalidated the association's finding of ineligibility. The ostensible reason was that the regulations lacked

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<sup>90</sup> See *Barnhorst v. Missouri State High School Activities Ass'n*, 504 F. Supp. 449, 454 (W.D. Mo. 1980); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.* 552 S.W.2d 685, 688 (Ky. App. 1977); *Bruce v. South Carolina High School League*, 189 S.E.2d 817, 819 (S.C. 1972).

<sup>91</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

<sup>92</sup> See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

<sup>93</sup> 305 N.E.2d 877 (Ind. 1974).

the basic rationality necessary to pass muster under the equal protection clause. The court noted that the object of the rules was to deter recruiting and athletically related school-jumping. In the court's view, all persons not within the two exceptions mentioned above were presumed to have been the victims of unscrupulous recruiting. But, the court felt, in this respect, the rules "swept too broadly." Those who changed schools for wholly personal or family reasons were indiscriminantly lumped with those who had been improperly recruited. The restraints imposed on the former furthered no legitimate associational purpose.

Despite the courage of the Indiana Supreme Court's effort to correct a perceived inequity, it is not clear that the proffered analysis can be sustained under prevailing federal constitutional principles. The court did not suggest that the rule before it called for anything other than a review under the permissive standard. But as previously noted, the fact of a regulation's overinclusiveness is ordinarily not a reason to invalidate it. Mathematical precision is not required in the definition of the classes of persons to be controlled. The Indiana court was particularly concerned about the fact that guardians were treated less favorably than parents under the applicable rule. An administrative body may decide, however, that some varieties of a particular problem are more demanding of regulation than are others. Or the administrators may conclude that there are some varieties that are of sufficient factual complexity that they should be regulated in gross. The equal protection clause does not provide the grounds for unsettling these determinations. Courts in later cases have shown a greater sensitivity to these principles, and as a result, *Sturrup* has not had a significant impact.

### *Implications for the Future*

A reading of the cases considered above would not suggest that the 1980's would be a period of tumult as far as transfer rules are concerned. Because of other considerations, however, this prediction is not free from doubt. For one thing, the cases to date have not fully considered arguments to be made in favor of increasing the respect to be accorded family and individual choice in these matters. We have previously noted the affinity between these concerns and those that led to the invalidation of grooming and marriage rules. In addition, an appraisal of the future must take account of recent case developments which seem to subject associational rules to closer scrutiny than has been applied in the past. In that same vein, the potential impact of the earlier *Bunger* decision remains to be explored. Finally,

the correctness of the early cases should not be taken for granted. This is especially true with respect to the continued invocation of principles from the law of private associations.

### 1. *Reassessing the Role of Private Association Law*

One development which should come about is the courts' abandonment of any adherence to the law of private associations in legal challenges brought by students. It is difficult to understand how the associational law theory gained such a firm foothold in the first place. Considering the fact that it has been applied as recently as 1977, its durability is equally perplexing.<sup>94</sup>

The general judicial policy of deferring to the internal decisions of private associations is understandable. A wholly private group should be allowed maximum leeway to define its purposes, the character of its membership, and the nature of its venture. Without this freedom to shape their own affairs, private associations would likely evolve according to some undistinguished, modest norm. While all of that is true, it seems to have little to do with complaints raised by students against high school association rules. The essence of private association law is *consent*. The courts can abide an association's decisions because the affected members have consented to them. If the member does not like the rule, he can leave the association. In the absence of such a defection, consent will be implied.<sup>95</sup> In any event, internal governing processes are open to the disgruntled member, and he may seek a modification of the offending rule.

That model hardly fits the role of the student in the typical high school athletic association. The student is not a member;<sup>96</sup> nor has he or she participated in the formulation of policy. Further, the activity in question is not a "private affair," but rather is in the form of a public regulation.<sup>97</sup> In short, the consensual premise of the associational theory is absent.

Apart from this basic misconception, the application of this body of law suffers from another significant defect: it introduces a basic logical fallacy into the jurisprudence of judicial review. It will be re-

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<sup>94</sup> See *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977).

<sup>95</sup> This is reflected in the notion that the relationship among members is one of contract. Some authorities endorse the view that each participant has agreed to be bound to the association's governing standards. See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1001 (1930).

<sup>96</sup> See *Chabert v. Louisiana High School Athletic Ass'n*, 323 So. 2d 774, 777 (La. 1975).

<sup>97</sup> Compare *Spain v. Louisiana High School Athletic Ass'n*, 398 So. 2d 1386 (La. 1981).

called that the standards for review under private association law and state public law were qualitatively different. Review under a private association theory is virtually foreclosed altogether. Only in the most extreme cases where there is fraud, corruption, or some other extralegal influence is judicial intervention authorized. While state public law principles are also highly deferential to the decision-making of state agencies, the deferral is not complete. Actions which are arbitrary or otherwise contrary to the relevant factual circumstances can be overturned. Even if made with complete innocence, these misdirections are not allowed to stand.

There is little dispute that the more exacting standards of review are applicable to actions taken by school boards. And there should be little disagreement in most states that athletic associations obtain their authority by actual or implicit delegation from local school authorities. The associations devise rules on matters — discipline, eligibility, etc. — which the school board would otherwise have to address. Because of this relationship, it can be ventured that whatever level of judicial review obtains to decisions made directly by school boards should not be lessened when the board chooses to operate through a delegate. In other areas of the law the principle is well-established that an entity cannot lessen its legal accountability by a simple appointment of a surrogate.<sup>98</sup>

Future litigation should not be burdened by the continued misapplication of association law principles. The nearly-complete legal immunity which these notions produce seems inconsistent with the non-consensual characteristic of the students' involvement in the rules in question. The standard of review that eventually evolves may not be a wholly expansive one. It should, however, be more sensitive than that which normally applies to private, consensual affairs.

## 2. *Case Developments*

Compared to the litigation of the 1970's, the first decisions of the 1980's would appear to offer encouragement to those seeking to invalidate transfer rules. In two decisions of note, one involving a transfer rule and the other an analogous regulation, the courts have indicated

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<sup>98</sup> This notion is basic in the law of contracts, for example. While a contracting party is generally free to delegate his contractual duty of performance to another, the delegating party remains fully liable for any defects in his delegate's performance. See 4 A. CORBIN, CORBIN ON CONTRACTS § 866 (1967). Similar principles can be found in the law of agency. See RESTATEMENT (SECOND) OF AGENCY § 144 (1958). Finally, the same notions have important applications where public bodies choose to allow an external entity to perform its public obligation. See e.g., *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555, 560 (Iowa 1972).

impatience with the tendency of athletic regulators to draw their regulations in sweeping fashion. In each case, the disputed regulations were set aside. Does this forecast a basic shift in judicial emphasis? Because one case indicated a willingness to elevate the role of parental decision-making, the precedents certainly warrant attention. Whether their new direction is an accurate forecast of what other courts will do is, however, a different question.

a. *Sullivan v. University Interscholastic League*

We earlier elaborated on the tendency of transfer rules to bring within their prohibition persons who undisputably have not been subject to recruiting pressures and whose transfers bear no athletically-related motivation.<sup>99</sup> Those same objections underlie the complaint in *Sullivan v. University Interscholastic League*,<sup>100</sup> a 1981 decision of the Texas Supreme Court. John Sullivan had moved to Austin, Texas from Vermont when his father's employment was transferred. It was accepted that the young man had not been recruited or subjected to other improper pressures. The student was, however, declared ineligible for a period of one year following the transfer. The pertinent rule of the defendant association did not recognize an exception for cases in which there was a bona fide transfer of the parents' residence. Exceptions were allowed in other situations, however. For example, in the case of a student who had only one year high school eligibility remaining, the rule provided for a specific individualized review under which the transfer would be approved in the absence of evidence that the student had been recruited.<sup>101</sup>

The plaintiff attacked the relevant rule on equal protection grounds, and the court found that the relevant standard of review was the permissive rational relation test. Despite the liberality of that standard, the court held the rule to be constitutionally defective. The court began its analysis by observing that the rule created two classes of persons — those who transferred and those who did not — and afforded significantly different treatment to each of these.<sup>102</sup> One class was denied eligibility for a year while the other was left unaffected. The court found this classification scheme to be irrational in light of the stated goal of deterring the recruitment of athletes. The rule was thought to be "overbroad and overinclusive" because it im-

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<sup>99</sup> See text at notes 19-20, 84-88 *supra*.

<sup>100</sup> 616 S.W.2d 170 (Tex. 1981).

<sup>101</sup> *Id.* at 171.

<sup>102</sup> *Id.* at 172.



posed burdens on some persons who had clearly not been recruited, such as those who moved in conjunction with a change in the parents' employment.<sup>103</sup> The court also noted that the rule did make an exception for seniors and stated that it saw no rational reason why that exception, which included an individualized review, could not be extended to others. In short, the regulation operated too harshly in light of the goal ascribed to it.

While the court purports to decide the case under the federal constitutional principles, it neither cites nor discusses the major Supreme Court precedents that give texture to the rational relation test. An examination of those principles suggests that the *Sullivan* decision contains many of the same defects found in the *Sturup* decision discussed earlier. The court assumes that an equal protection objection has been validated if the rule in question affects some persons who do not share in the evil that prompted the regulation. That, however, is not the lesson of the equal protection precedents. Regulations may be drawn broadly. The relationship between the state interest to be served and the persons regulated need not be exact.<sup>104</sup> In short, the inequity of overinclusiveness will be tolerated, assuming again that no suspect class or fundamental interest is involved.

It is true that the rule in question did make an exception for seniors and did provide for an individualized inquiry in that case. But contrary to what the court suggests, the fact that one exception is allowed and another equally defensible exception is ignored, does not establish the basic irrationality of the regulation. If there ever were any doubt, the Supreme Court has recently confirmed that the equal protection clause does not compel a state to grant all reasonable exceptions merely because some are made.<sup>105</sup> This outcome is consistent with the basic notion discussed earlier that a state is allowed to approach a regulatory problem on a piecemeal basis. Perfect balance in a regulatory scheme is a political ideal, not a constitutional mandate.

The occasional appearance of equal protection analysis like that in *Sturup* and *Sullivan* may reflect a need among lower courts for more sensitivity to the Supreme Court's basic directives on the per-

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<sup>103</sup> *Id.* at 173.

<sup>104</sup> See authorities cited in notes 91-92 *supra*.

<sup>105</sup> See *New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976).

In *Dukes*, the city of New Orleans banned pushcart vendors from the French Quarter but included an exception that allowed two existing operators to continue in business. Other vendors whose business was curtailed raised an equal protection objection. The Court denied their claim, quoting prior decisions which upheld the right of the state to engage in partial reforms. See 427 U.S. at 305. See also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 899-91 (1955).

missive standard of equal protection review. It will be recalled that the Court has said that once a legitimate regulatory purpose has been identified, the ultimate question to be asked is: "Was it reasonable for the [rule-makers] to believe that use of the challenged classification would promote that purpose?"<sup>106</sup> This is not an exacting standard, and was not intended to be. It will tolerate some rules that are ineffective, some that are countereffective and some that are simply unwise. The important issue, again, is only whether the rule-makers could have reasonably believed that the rule would further their regulatory purposes.

In the context of the *Sullivan* case, the relevant inquiry is whether the athletic association could have expected that a broad-based rule would promote its desire to discourage recruiting and maintain a proper balance between athletics and academics. On several grounds, the conclusion can be accepted that the association might well have concluded that these goals would be furthered. The rule-makers could conclude, for example, that even when an employment-related transfer occurs, there is still room for athletically-related school selection decisions to be made. The fact of the employment change does not refute the possibility that a student might later be subjected to recruiting pressures as he or she decides among the several schools located in the area of the new employment. Relatedly, even when the factor of recruiting is not present, the athletic regulators might decide that the family's selection among competing schools should be influenced by academic considerations and not athletics. A desire to maintain the predominance of academics is a separately recognizable and wholly legitimate goal.

A further ground that the regulators might have relied upon is a concern for the costs and burdens of administering the transfer rules. They could well have decided that the expenditures required to differentiate between athletically-motivated and more neutral transfers were simply not justified in light of the incremental increase in refinement that would occur.<sup>107</sup> Given the impressionistic nature of the issue, and the difficulty of exacting neutral testimony, this judgment cannot be readily dismissed as fanciful.

b. *Kite v. Marshall: Protecting Family Privacy?*

The reluctance of the Supreme Court and subordinate courts to overturn state regulations under the permissive equal protection test

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<sup>106</sup> See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-65 (1981).

<sup>107</sup> Compare *Weinberger v. Salfi*, 422 U.S. 749 (1975). See also text at note 89 *supra*.

can be explained on the ground that there is no fundamental, personal interest at stake. By definition, the permissive standard is applied only after we have concluded that there is no substantial, separately protectible interest involved. Thus, for the constitutional law theories to be useful, litigating students must be able to assert an interest of the sort that prompts the more exacting levels of judicial review.

Our earlier discussion of the policy-based criticisms of existing regulatory trends identified one interest that would seem to be of a higher order than those that have been litigated to date. It was suggested that a decision with respect to the relative emphasis to be given athletics might be viewed as a matter of student and family privacy. While administrators could decide on the character of their own programs, they need not be allowed to restrict parental choices among the programs that are otherwise available. If the student and parental interest in controlling the youth's athletic involvement includes a constitutionally protected dimension, then the courts would be compelled to subject the state's intrusions to more exacting scrutiny.

The concern for student and family privacy was given currency for a brief period of time by the 1980 federal district court decision in *Kite v. Marshall*.<sup>108</sup> That decision firmly embraced the notion that parental choices were entitled to primacy in matters relating to child rearing. If left standing, the initial *Kite* decision would have had far-reaching implications for the regulation of interscholastic sports. On appeal, however, the family privacy analysis was pointedly rejected and the initial decision reversed.<sup>109</sup> Nonetheless, the decisions in *Kite* are of considerable importance. As a preliminary exploration of the limits of parental control in athletic matters, they have served to focus debate on the critical issue of the proper interpretation of existing Supreme Court decisions in the privacy area.

The dispute in *Kite* focused on a rule of the Texas high school athletic association, which sought to discourage student attendance at specialized summer sports camps. Any student attending such a camp lost a year's eligibility. The prohibition was absolute and, unlike the comparable rules in other states, did not tolerate even one or two weeks attendance at such camps. Like the transfer rules that have provided the main focus of this paper, the summer camp rule in *Kite* represented an effort to control the relative emphasis given to

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<sup>108</sup> 494 F. Supp. 227 (S.D. Tex. 1980).

<sup>109</sup> 661 F.2d 1027 (5th Cir. 1981).

school-related sports endeavors. The rule was prompted by a prior incident in which a coach had taken his entire team to a camp for a summer long practice.<sup>110</sup> There was also proof that some camps continued to place an undue emphasis on winning and aggressiveness.

The plaintiffs, who were high school athletes and their parents, grounded their case squarely on the theory that there is a "right in the family unit to decide what is best for the family," especially as far as the interests of minor children are concerned.<sup>111</sup> The plaintiffs thus avoided the weaknesses of prior cases which argued for "a right to participate," a right that has not been recognized. In its essence, the plaintiffs' claim was a claim to substantive due process. The regulation in question, it was urged, infringed on important constitutional rights and thus could be sustained only if it were prompted by an important state interest and were otherwise narrowly drawn.

The federal district court undertook a very deliberate analysis of the issue before it and ultimately held the rule to be unconstitutional. The court was able to find a variety of statements from the Supreme Court that seemed pertinent to the issue before it. For example, the Supreme Court had recognized the right of parents "to direct the rearing of their children."<sup>112</sup> Relatedly, the Supreme Court had said that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."<sup>113</sup> Finally the district court quoted language in which the Supreme Court had found in parents a "duty to prepare the child for additional obligations."<sup>114</sup> The district court accepted these statements as supporting the view that the parental choice involved in a summer camp decision was "deserving of constitutional support."<sup>115</sup>

Accepted doctrine required that the court go further, however. Before regulation affecting a constitutionally protected interest could be struck down, the extent of the state's interest had to be appraised, as did the question of whether the regulation was drafted with appropriate narrowness. The district court ultimately found that the state had a "compelling interest" in the matter at hand.<sup>116</sup> The state was charged with providing the structure for public education. It was

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<sup>110</sup> *Id.* at 229.

<sup>111</sup> *Id.* at 230.

<sup>112</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

<sup>113</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>114</sup> 494 F. Supp. 227, 232 (S.D. Tex. 1980), *quoting* *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

<sup>115</sup> 494 F. Supp. at 232.

<sup>116</sup> *Id.* at 233.

thus empowered to insure that the system it devised, including the athletic component, was operated in an efficient and fair manner. But in the court's view, the rule was not drawn with the "narrow specificity" required of important constitutional concerns.<sup>117</sup> In effect, the rule chose to control the offenders (some coaches who used summer camps for recruiting purposes) by regulating the victims (the athletes who attended the camps). The conduct of all athletes was impeded, and the prerogatives of their parents infringed, for the purpose of securing conforming behavior from overzealous coaches. Further, the association had "failed to show that it is without any other reasonable way to achieve its goals."<sup>118</sup>

Had it been allowed to stand, the district court decision in *Kite* would have had far-reaching implications for the regulation of amateur athletics. If a parental decision on the child's attendance at summer camp is to be respected, should not the same deference be shown for other parental decisions, such as those involved where the parents move for an athletically-motivated reason or where similar goals prompt the parents to allow the student to move alone, perhaps to a relative who assumes the position of guardian? Indeed, it would seem that most aspects of eligibility regulation could be viewed as involving some element of parental choice. As noted, however, the case will not have that effect. The initial decision was reversed when the case was appealed to the Fifth Circuit Court of Appeals.

The appellate court revealed itself to be wholly unpersuaded by the multi-step analysis of the district court's opinion. Indeed, the reviewing court's rejection of the earlier decision went to the heart of the issue at hand. Although there is a bit of equivocation, the Fifth Circuit's opinion raises a doubt as to whether there is any separately recognizable "right to family privacy." For example, after noting that plaintiffs' arguments were supposedly based in the Constitution, the court expressed its view that "uncertainty abounds not only as to the constitutional spring from which this family privacy right flows, but also as to its definition and character."<sup>119</sup> The reviewing court also took a different view of the import of the Supreme Court family law decisions. Reference was made to cases involving corporal punishment, teenage abortion, and private segregated academies in which the Supreme Court declined to give controlling weight to parent preferences. In appraising these, the Fifth Circuit observed that when

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<sup>117</sup> *Id.*, quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

<sup>118</sup> 494 F.Supp. at 233.

<sup>119</sup> 661 F.2d at 1029.

"[c]onfronted with these situations which, at first blush, appear to rest at the heart of parental decision-making, the Supreme Court refrained from clothing parental judgment with a constitutional mantle."<sup>120</sup> Again, an implication of this analysis is to question the very existence of a right to family privacy.

In light of this apparent premise, the Fifth Circuit's ultimate conclusion is not surprising. Its summary appraisal of *Kite* was that "[T]his case implicates no fundamental constitutional right."<sup>121</sup> Since no fundamental interest was involved, the regulation in question would be saved by a showing of mere rationality. The need to control overzealous coaches, to maintain competitive balance, and to reduce pressure on students were thought to present plausible, and hence sufficient, justifications.

It is not certain that the appellate court's decision in *Kite* will represent the final internment of the family privacy argument. The apparent denial of the existence of a right to the family privacy is a position not likely to be accepted without question by future litigation.<sup>122</sup> Language from earlier Supreme Court decisions suggesting the existence of such a right will likely provide the fuel for a continuing debate. These pronouncements provided the foundation for the district court's opinion and were never fully refuted in the appellate court's review.

This is not to suggest, however, that the ultimate resolution of the family privacy issue was incorrect. There is another view of the Supreme Court's decision which would deny *Kite*'s complaint but not require a complete refutation of family privacy notions. Specifically, it can be noted that while the Supreme Court has emphasized the importance of the family in giving direction to children's lives, the actual issues resolved in the cases in which these concerns appear are far removed from these raised by the plaintiffs in *Kite*. The Supreme Court's "family privacy" decisions in general deal with matters relating to issues of abortion, contraception, and the rights of illegitimates.<sup>123</sup> None of the cases deal with a family decision as far removed from basic issues of life and personal identity as the question

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* The abruptness of the court's conclusion that *Kite* involved no protectible right seems to have been tempered somewhat in a later decision from another Fifth Circuit panel. While the court in *Laurenzo v. Mississippi High School Activities Ass'n*, 662 F.2d 1117 (5th Cir. 1981), ultimately dismissed the complaint before it as moot, the court did find that the plaintiff's allegation of an invasion of family privacy was sufficient to establish federal jurisdiction.

<sup>122</sup> See note 121 *supra*.

<sup>123</sup> For a general discussion of the Court's pronouncements in the area of family privacy, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 995-90 (1978).

of whether a student will be allowed to attend a specialized summer athletic camp. While the Supreme Court has shown itself ready to intervene where basic issues of human life and control of reproduction are involved, it has not ventured very far into more routine issues involving the accommodation of family preferences and admittedly legitimate state interests.<sup>124</sup>

Thus, while the notion of family privacy may have validity, its configuration is much more narrow than the district court in *Kite* assumed. The case which will raise the family privacy claim most strongly is likely to be one in which the disputed regulation disadvantages a fundamental feature of the parent-child relationship.<sup>125</sup> General claims of "parental preference" are not to be wholly ignored, as suggested in the next section. They may not, however, be entitled to constitutional protection.

### 3. *Reassessing the Policy of Extreme Judicial Deference*

As previously noted, the traditional approach to evaluating athletic regulations was one of extreme judicial deference. The law of private associations was hardly an intrusion.<sup>126</sup> Even the potentially more exacting state public law principles were applied without a serious, critical examination of the substance of the plaintiff's complaint.<sup>127</sup> Relatedly, the permissive standard of equal protection review almost

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<sup>124</sup> *Pierce v. Society of Sisters*, 268 U.S.510 (1925), is one of the few cases applying notions of family autonomy outside the areas of conception, contraception, and illegitimacy. The Supreme Court struck down an Oregon law which allowed children to receive their education only in public schools and thus in effect forbade attendance at private schools. The Court objected that this was an attempt by the state "to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

*Pierce* lends some support to the notion of the privacy of parental choice in their children's development, a policy which is similar to that involved in *Kite*. Nonetheless, *Kite* is hardly a mirror of the issue in *Pierce*. The regulation in *Pierce* was a pervasive attempt by the state to eliminate a particular type of parental decision — reliance on private schools as the source of educational instruction. The rule in *Kite*, however, affects only a small part of the child's total development and even then represents a limited intrusion. Parents may continue to encourage their children's athletic endeavors. They are only directed to avoid a form of specialized instruction (the summer sports camp) that was apparently thought to present a particular risk that athletics would be overemphasized.

<sup>125</sup> For example, a regulation which placed a burden on a transfer of legal custody between divorced parents might require closer scrutiny than the regulation involved in *Kite*. The former affects the child's basic relationship with his or her parents, while the *Kite* regulation touches only on an issue of parental discretion. While the issue of custody transfers has been involved in a couple of cases, no final resolution of the constitutional issue has been achieved. See *Laurenzo v. Mississippi High School Activities Ass'n*, 662 F.2d 1117 (5th Cir. 1981); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 522 S.W.2d 685 (Ky. App. 1977).

<sup>126</sup> See text at notes 42-46 *supra*.

<sup>127</sup> See text at notes 47-68 *supra*.

inevitably deferred to the "practical difficulties" of drawing and administering precise regulations.<sup>128</sup>

Several courts, however, have indicated a restiveness with the traditional approaches. If the stated legal theories are set aside for the moment, one can see an affinity in the recent decision in *Sullivan*, the district court decision in *Kite*, and the somewhat earlier ruling in *Bunger*.<sup>129</sup> In each instance, the court was presented with a regulation that was drawn with an extremely broad sweep. Especially in *Sullivan* and *Bunger*, the disputed rule was applied to someone who seemed far removed from the evils that likely prompted the regulation in the first instance. In the view of the district court, *Kite* similarly presented an example of indiscriminant regulation, for one could doubt, as the court did, that summer athletic camps represented the pervasive evil that the regulation presumed.

These decisions, and some other cases that had less encouraging results for the athlete-plaintiffs, underscore a basic problem with the jurisprudence of this area: if the courts refuse to intervene, one may question whether sufficient incentives exist to ensure that rules are drawn with appropriate sensitivity to the risk of over-regulation. To raise this concern is not to insist that the rules must except every class that should be exempted and that varying levels in the seriousness of the offense must be exactly calibrated. Nor is it to suggest that regulations must be devised without regard to their administrative cost. Rather the issue to be posed is one of degree. Athletic administrators should have some obligation to make a reasoned effort at exempting cases which need not be regulated and which can be identified with relatively little cost.

The highly deferential premises of the equal protection doctrine and state public law seem to be based on a key assumption about the nature of the underlying political institutions. It is presumed that defects in the regulatory coverage will be corrected through the normal operation of the underlying legislative process. Thus, if a regulatory measure suffers from overbreadth, those who are unnecessarily brought within its coverage can be expected to raise objections to their legislators. The depth and substance of the protestation will be appraised and if substantial enough, will presumably prompt an appropriate legislative correction.<sup>130</sup>

It is not obvious, though, that this legislative model is the appro-

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<sup>128</sup> See text at notes 89-92 *supra*.

<sup>129</sup> *Bunger* is discussed at notes 65-68 *supra*.

<sup>130</sup> See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 999 (1978).



priate one where athletic regulations are involved. A significant difference is that the persons regulated — the athletes and vicariously their parents — have limited input into the decisions that are made. As previously noted, they are not members of the rule-making organizations and typically are not consulted in the deliberations that precede governance decisions.<sup>131</sup> Moreover, within the association there are frequently groups other than the athletes that are the focus of the group's deliberations on student-related rules. As we have seen, for example, athletes often bear the burden of regulations that are intended to control the actions of coaches.<sup>132</sup> Thus on the matter of student eligibility, there appears to be a confusion of constituencies. It is by no means certain that the athlete's best interests are the predominant legislative force.

The concern for limitations in the internal processes of athletic associations may not mean that a radical new judicial doctrine needs to be devised. To the contrary, it is a concern that can be accommodated within the confines of existing theories. What is required is a modest adjustment in the level of judicial scrutiny that is otherwise taken. Rather than treating the athletic association with the same deference that would be shown to an entity in the normal political channels, the courts should allow themselves the freedom to insist that the scope of regulation not exceed the limits of the regulatory problem that exists. As at present, the courts would not review the wisdom of a regulation or appraise its merits relative to competing models. The court would, however, be alert to the rule-makers' insensitivity to the potential for unnecessarily burdening innocent parties.

A model of judicial review which is particularly appealing is that applied in the *Bunger* decision. The formal rule in *Bunger* is premised on two questions: did the rule-making entity have authority to regulate the particular activity? If so, was the particular rule or ruling a rational exercise of that authority?<sup>133</sup> It will be recalled that the rule in *Bunger* failed to satisfy the second test. The athletic association had attempted to deny eligibility to a player who, outside the school year, was innocently present in an automobile in which alcoholic beverages were being transported. While the court stated that regulation on some other combinations of facts would have been appropriate, in the present case, the regulation was irrational. It attrib-

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<sup>131</sup> See text at notes 96-97 *supra*.

<sup>132</sup> See *Kite v. Marshall*, 494 F. Supp. 227, 233 (S.D. Tex. 1980). See also text at notes 38-39 *supra*.

<sup>133</sup> See *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Board Directors of Independent School Dist. of Waterloo v. Green*, 147 N.W.2d 854 (Iowa 1967).

uted to the student a characteristic (improper alcohol use) that was not present and involved an incident that was far removed from the school year.<sup>134</sup>

One can find in other cases a similar quality of irrationality. For example, the result in *Sullivan* could be explained in these same terms: where the purpose of a rule is to discourage recruiting and school-jumping, it is irrational to apply that rule to one who is forced to move because of a family employment transfer.<sup>135</sup> Even *Kite* can be brought within this analysis. The rule involved in that case was adopted because a coach had practiced with his entire team for a substantial part of the summer. While that presents a problem requiring regulation, an absolute, unbending prohibition on attendance at a summer camp has a strong element of irrationality. If the period of attendance is short and if the student's coach is in no way involved, it is difficult to see the reason for the prohibition. A student's participation under these circumstances has none of the characteristics that prompted the adoption of the regulation. Rather than representing a reasoned response, the regulation is more likely explainable as the product of a defective legislative process.

The cases mentioned above are decisions in which the student prevailed on some theory other than the state review provided in *Bunger*. But proper application of *Bunger* should also cause a rethinking of some of the prior decisions that upheld association regulations. For example, a test of basic rationality would allow a court to intervene in a case like *Kentucky High School Association v. Hopkins County Board of Education*.<sup>136</sup> That case involved a situation, mentioned earlier, in which a student transferred schools after parental custody was legally changed from one divorced parent to another. The athletic association denied eligibility to the student for one year because its rule allowed a change of school only if there was a "change" in the parents' residence. The literalistic interpretation applied in this case can be said to lack basic rationality in the face of a legal change in the identity, and hence, the residence of the parent.

This type of case is somewhat different from *Sullivan* and *Kite*. The issue involved is one of interpreting the association's rules,

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<sup>134</sup> See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 44-59 (1979).

<sup>135</sup> This view of the case would require that one avoid a purely speculative appraisal of the rule-makers' motive. Such conjecture is allowed under the permissive standard of equal protection review. See text at notes 77-78. The standard suggested in the text seeks to elevate the standard of judicial review and thus would require a more factually-based assessment of the rule-makers' purpose.

<sup>136</sup> 552 S.W.2d 685 (Ky. App. 1977).

rather than questioning their legal basis. But here again, the application of a rationality analysis seems sound. Without this type of review, there is little to protect the athlete from arbitrary or, more likely, unthinking interpretations of association rules. Errors of interpretation can be made as readily by public entities as by private contracting parties.<sup>137</sup> Since courts are available to provide corrective guidance in the case of wholly private agreements, it would seem that they should be no less available where a public undertaking is involved.<sup>138</sup>

One attraction of a test focusing on a rule's rationality is that it allows a court to make functional differentiations between cases. Once the court identifies the purpose of a rule, it can then inquire into whether the facts and circumstances of the plaintiff's situation indicates that it is one that presents the evil that the athletic administrator sought to control.<sup>139</sup> If there is a risk that recruiting or some other improper influence was present, then the regulation should be sustained. The result should be the same if the risk of an improper influence is unknown. But the court would also be empowered to allow the plaintiff to show that his or her circumstances disprove the possibility of an impropriety.

If the motivations for the student's move are beyond the normal jurisdiction of the administrators, as where they are related to a transfer of employment, then the intensity of judicial scrutiny should be increased. Whether the regulation will be allowed in such a case should depend upon further facts. The association may properly take account of the cost of making individualized determinations and may decline to adopt a general policy to this effect. But where the absence of the evil prompting regulation can be proved with relative ease, the threshold of irrationality is transversed by a rule which fails to admit of such an exception.

A further attraction of this approach is that it offers a state law theory of review. Since athletic associations and school boards operate as state entities, it is appropriate that state law provide a mechanism through which misdirections in regulatory authority can be cor-

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<sup>137</sup> The need for judicial review would seem to be stronger where the problem is an error of interpretation, as opposed to a rule which is substantively offensive. In the latter case, some argue that the normal, internal political processes of the rule-making body can be relied on to provide a corrective. See note 130 and accompanying text. This justification is not persuasive where there is a misinterpretation of the rule in a particular case. Whatever political pressure is brought to bear to improve the interpretative process, it is not likely to yield retroactive relief for individual cases.

<sup>138</sup> See note 18 *supra* and accompanying text.

<sup>139</sup> See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 44-59 (1979).

rected. Indeed, basic notions of jurisprudence would suggest that the authority that has created an entity has an obligation to provide a vehicle for hearing complaints that the entity has abused the authority that was granted.<sup>140</sup> Such state-based review will also help to ensure that the process of judicial oversight takes appropriate account of differences among the regulatory structures for school sports in the various states.

It might be asked whether this same approach could not be accommodated under federal equal protection notions, even where the applicable standard is one of permissive review. After all, the basic test in that area is one that nominally requires a rational relation between the purpose of the regulation and the conduct regulated. However, the thrust of the Supreme Court's decisions has been to give regulators maximum leeway where no fundamental interest is involved. As previously noted, the fact of overbreadth is typically not a reason for judicial concern, and the court will accept even some admitted inequities.<sup>141</sup> This tradition of constitutional deference to legislative decision-making as well as basic concerns for federalism relegated permissive equal protection review to a more limited sphere. Again, the problem at hand seems to be one better suited for an entity charged with ensuring the basic integrity of the local legal system.

### *Conclusion*

An earlier portion of this paper set forth some of the policy objections that might be raised against the present rules for regulating interschool transfers. Among other things, the question was raised as to whether greater freedom ought to be allowed for the exercise of parental choice. In addition, it was noted that transfer rules frequently are drawn with considerable imprecision. A rule may impose a wholesale prohibition affecting even relatively innocent school changes and at the same time allow exceptions which can be used by those with blantly athletically-related motivations. To what extent will the law provide the mechanism for correcting the defects assumed by these objections? The prior analysis should give some

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<sup>140</sup> Concerns for federalism might provide some hesitancy on the part of the federal judiciary to overturn the enactments of state agencies. It seems appropriate that states undertake a more extensive role to ensure that state regulatory authorities are subjected to proper accountability. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 477-89 (1981).

<sup>141</sup> "If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), *quoting*, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

idea of the rule of judicial review in this area. A pervasive theme of the cases in this area is that the courts are not available to vindicate all objections that might be raised to athletic association rules. It is accepted that school boards and athletic associations must be given considerable freedom to respond to the conflicting interests of affected parties and to take account of practical financial and time limitations on the entity's capacity for administration.

At one time, these considerations produced virtual legal immunity for athletic administrators. Historically, it has been extremely rare for a court to overturn an administrative rule in this area. It appears, though, that that attitude is changing. Contrary to the desires of some, however, the change does not appear to be of revolutionary proportions. Rather, it appears that cases at the margin will now be examined more closely by the judicial institution. It is suggested above that the courts have begun to endorse a somewhat more exacting standard of rationality than had been traditionally applied. The standard should be particularly useful in prompting athletic administrators to except from regulation those cases which represent little or no risk of abuse.<sup>142</sup> Similarly, a rule which regulates insignificant incidents and ignores obvious abuses will be vulnerable under the newly emerging standard.

By the same token, however, there will be many potential objections that will not prompt judicial intervention. For example, the desire of some for complete parental choice is most unlikely to be given judicial consideration. Relatedly, judicial review will not mandate that the administrators ferret out all instances of transfer abuses. The explanation for why such "defects" are tolerated involves a basic point about the nature of the legal process. It is not the obligation of the courts to ensure that other political and governmental institutions function with exacting precision. A good deal of slippage in the regulatory apparatus must be tolerated. This is particularly true in the area of athletics where the affected subject matter has historically been thought not to involve a fundamental right. Thus, there may be important policy objections that have not been fully considered in the administrative processes affecting athletics. These are appropriate agenda items for the deliberations of the administering agencies.

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<sup>142</sup> As suggested above, the decided cases included several situations in which this standard might be used to protect students from inappropriate findings of ineligibility. *See, e.g.,* Kite v. Marshall, 494 F. Supp. 277 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-2006); Sullivan v. University Interscholastic League, 599 S.W.2d 860 (Tex. Civ. App. 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981); Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774 (La. 1975).

They are not, however, translatable into legal objections. Even with the liberalization seen recently, and that anticipated in the years ahead, the function of the judiciary will be limited. While we should see a move toward greater rationality at the margins, basic shifts in the orientation of athletic regulations will have to be the product of actions at a different institutional level.